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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 463

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 464

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 465

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No. 466

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No. 473

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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The appellees Maryland Port Authority and Baltimore Association of Commerce move to affirm on the ground that the questions presented are so unsubstantial as not to need further argument.

STATUTES INVOLVED

Judicial Code Sec. 1336, 28 U.S.C. Section 1336—

> "Interstate Commerce Commission's Orders — Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

QUESTIONS PRESENTED

1. *Is there a lack of basic findings to support the conclusions reached by the Interstate Commerce Commission in favor of a parity of rail rates on imported iron ore from New York, Philadelphia and Baltimore, respectively, to the seventeen destinations?*

The District Court held that essential findings are lacking, and the Jurisdictional Statement filed herein by the Solicitor General concedes (page 5) that such "may well be the case." We think the lack can be demonstrated without further argument, in a short statement, and we attempt to do this below. If there is such a lack of findings, this is adequate ground for the District Court's setting aside the Commission's order, and other issues listed by the various parties, except those that question the relief granted by the District Court, relate to alternate grounds of decision that are not reached.

2. *Was it an abuse of the District Court's discretion to enjoin the New York rates, instead of remanding to the Commission as it did in the case of the Philadelphia rates?*

The power to enjoin an order of the Commission not based on adequate findings is clearly conferred on the District Court by statute, 28 U.S.C. Sec. 1336. This court has sustained injunctions issued against orders of the Inter-

state Commerce Commission on the ground that there were not adequate findings. *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935); *Interstate Commerce Commission v. Mechling*, 330 U.S. 567 (1947); *U. S. v. B. & O. R. Co.*, 293 U.S. 454 (1935). In the present case the setting aside of the Commission's order approving the New York rates, instead of remanding, is a matter of procedural detail and not of substance. The order does not prevent the New York carriers or the Commission from justifying the same or any other rates in a new proceeding, on the same evidence as if the case had been remanded. Meanwhile the *status quo* is preserved, as it should be if necessary findings are lacking. The New York rates, on which no traffic has ever moved, and which cannot move any traffic until an expensive unloading facility has been commenced and completed, are prevented from going into effect until they are justified. The Philadelphia rates, which are in effect and on which great volumes of traffic are moving, are left in effect until the Commission can make the necessary findings. This is the shaping of equitable relief to avoid waste and is not inconsistent, as the Commission's Jurisdictional Statement calls it (page 19), and it is not a discrimination based, as the Solicitor General appears to consider it, merely on the fact that New York is more distant than Philadelphia from Central Territory.

STATEMENT

The District Court is Clearly Right in Holding that the Commission has Failed to Make Essential Findings.

The issue before the Commission was the proper relationship of railroad rates that would result in fair and nonpreferential competition for the traffic in iron ore imported by five steel companies, Armco Steel Corporation, National Steel Corporation, Republic Steel Corporation,

Wheeling Steel Corporation, and Youngstown Sheet and Tube Company, to furnaces at seventeen points in Central Territory. Superficially the issues were whether the respective carrier-initiated rates were just and reasonable. But the bone of contention between groups of carriers was the relationship that should exist between their rates, and the effect and purpose of the Commission's decision were to sustain the parity relationship desired by the New York and Philadelphia carriers and to strike down the differential relationship desired by the Baltimore carriers. It should be briefly stated how this issue arose.

Bethlehem Steel Corporation and United States Steel Corporation have been the principal consumers of iron ore imported from foreign sources, and in the years through 1950 about three-quarters of all the iron ore imported into the United States was consumed at a single plant of Bethlehem Steel Corporation located at Sparrows Point, outside Baltimore's harbor. Lesser volumes moved inland as far as Pittsburgh, but none moved west of there. The reason was that cost of transportation, which is a large fraction of the cost of iron ore delivered at the mill, made foreign iron ore more expensive than domestic ore except near the coast.

The result was that Bethlehem and U. S. Steel, the major companies that have plants at and near the seaboard, were the first to acquire and develop great foreign sources of iron ore. The production of these sources went almost entirely to these two companies and was consumed by them mainly at tidewater and none west of Pittsburgh. By 1950 the economics affecting the use of foreign iron ore were changing. Republic then had an iron ore development in Liberia, and this resulted in a rail movement to Ohio that was about half a million tons a year in 1953 and 1954, but,

with this exception, the five steel companies named above as having mills at the seventeen points had no foreign iron ore developments.

In 1950 it became known that these five companies, together with M. A. Hanna Company, had formed Iron Ore Company of Canada as a joint venture to develop iron ore deposits in Labrador and to consume the production in proportion to their respective interests. This impending movement, which had barely begun when the record in this case closed, generated the present controversy. The Commission estimated that by 1956 the Labrador movement would amount to 10,000,000 tons per year, about half of all the iron ore that would be imported into the United States, and that 5,000,000 or 6,000,000 tons of ore from Labrador would pass annually through the North Atlantic ports en route to Central Territory.

In response to this news the carriers serving Philadelphia published iron ore rates to the seventeen points at the same level as the rates from Baltimore to those points, and the New York carriers published equal rates to the seven of these points that their rails reached. The Baltimore carriers protested these rates on the ground that they ought to be no lower than they would be under the port-differential adjustment which for many decades had fixed freight rates to Central Territory according to a formula which, applied to iron ore moving to Youngstown, would make the rate from Baltimore twenty cents per ton under the rate from Philadelphia and sixty cents under the rate from New York. As an alternate move the Baltimore carriers published a new rate twenty cents below the protested Philadelphia and New York rates. This rate was in turn protested by the New York and Philadelphia carriers, and the Pennsylvania Railroad published a new rate from Philadel-

phia matching the Baltimore reduction. All these rates were suspended, and this proceeding commenced.

The findings of the Commission show that by the application of normal transportation considerations, leaving aside for the moment the adjustment of rates to foster competition, the Baltimore carriers were plainly entitled to lower rates, and as compared with New York the disparity of earnings that would result from equal rates was extreme. We will not dwell on this point, because the findings make it too clear to require argument. It is true that the Commission found the New York rates just and reasonable because they would earn out-of-pocket costs and found the proposed lower Baltimore rates, which earned far more, not just and reasonable because they would not bear a full share of all transportation costs. But this conspicuously arbitrary use of widely differing standards was obviously to force a result reached on other grounds. These are to be inferred from the Commission's statement that it is desirable in the interest of shippers and national defense to foster the development of more than one iron-ore port. The Commission further indicated its conclusion that the New York and Philadelphia carriers must have rates to the seventeen points equal to the Baltimore rates in order to compete for the traffic. It did not say this clearly or directly, so that even this ultimate conclusion is obscure, but that seems to be the only reasonable interpretation of the Commission's statement that the New York and Philadelphia rates appeared to have been fixed in an effort to secure a fair proportion of the traffic.

But we do not need to speculate as to the rationale of the decision of the Commission, since it is perfectly clear that without the conclusion that the New York and Philadelphia carriers need parity in order to compete with the

Baltimore carriers for this traffic, no legal basis exists upon which the action taken by the Commission in these cases can be supported. Thus, the argument derived from the supposed need in the interest of national defense of additional ports equipped to handle iron ore simply is not reached unless the need for parity in order to compete is first demonstrated. If New York and Philadelphia, because of other advantages, can obtain a fair share of this business without disregarding Baltimore's inland position, then obviously no question of national defense can arise. Likewise, the need for parity in order to obtain a fair share of this traffic must be shown before the Commission can reach the question whether the disregard of the transportation standard involved in the imposition of inherently unequal and discriminatory rates on Baltimore can be justified. *Scandrett v. U. S.*, 32 F. Supp. 995 (D. Ore. 1940), affirmed *per curiam* 312 U.S. 661 (1941); *All Freight From Eastern Ports to the South*, 245 I.C.C. 207, 222 (1941). It has long been recognized that localities are entitled to the benefit of their natural geographical advantages, at least unless countervailing considerations are shown to exist justifying their denial. *Texas & Pacific Ry. Co. v. U. S.*, 289 U.S. 627, 637 (1933); *U. S. v. Illinois Central R. Co.*, 263 U.S. 514 (1924). Finally, it is clear that any proposed rate must not be unduly preferential or discriminatory as between ports, regions or localities. *New York v. U. S.*, 331 U.S. 284 (1947). Where, as is the case here, ports seeking parity in disregard of normal rate-making standards are shown to have special advantages (in this case notably proximity to the principal source of the traffic) a showing of need for parity in order to obtain a competitive share of business is clearly essential, otherwise prejudice and preference would almost have to be presumed. For all of these reasons, we think that it is clear that the Commission must have founded its action in approving the rates proposed by the

New York and Philadelphia carriers and disapproving the lower rates proposed by the Baltimore carriers on a conclusion that such action was necessary in order to permit the more northerly ports to compete for a fair share of this traffic.

This conclusion that the New York and Philadelphia carriers need parity to compete with the Baltimore carriers for this traffic is based on no findings but, on the contrary, is in the teeth of findings pointing to the opposite conclusion. The findings show that the traffic that moves to the seventeen points in Central Territory is coming mainly from Labrador. The findings state that New York and Philadelphia are nearer than Baltimore to Labrador by sea by round-trip distances of 576 miles and 310 miles respectively. The Commission expressly finds that integrated shippers (those owning the vessels that transport the ore) "might" save cost and time by moving the ore to the port nearest the point of origin. Representatives of the five steel companies and of Iron Ore Company of Canada, the shippers involved, testified unanimously and unequivocally that their choice of a port would be governed by the lowest overall cost of transportation from Labrador to the consuming furnace and would be further governed by an effort to make the maximum number of round trips with the ore-carrying vessels because of the short duration of the Labrador season and because of their great investment in those vessels.

These findings require the conclusion that if the rail rates to the furnaces are the same for the long haul from New York as for the much shorter haul from Baltimore the result will not be fair competition but an allocation of the traffic away from Baltimore. If there are other factors that refute this conclusion the Commission has failed to

make any findings to that effect. The District Court therefore found that there is no basis in the findings for the Commission's conclusion that the New York and Philadelphia carriers need parity in order to compete.

If the Commission's report is searched for a finding responsive to this primary issue there can be found only the statement that it is persuaded that "the iron ore tonnage through Baltimore will probably continue to increase" despite parity rates. This statement appears to reflect statistics cited throughout the opinion showing, for various periods, receipts at Baltimore as swelled by the great and growing consumption of iron ore at Sparrows Point. But if the uncertain inference is made that this statement means that Baltimore's tonnage of westbound ore will increase, it hardly serves as an answer to the issue, since the rail movement in question had hardly begun when the record closed, and to say that the tonnage through Baltimore would increase is a Delphic answer to the question whether parity rates would afford a basis for fair competition.*

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* A word should be said of statistics showing that Baltimore has received Labrador ore after the Philadelphia rates went into effect. The total was substantial, but it shrinks to a degree that shows a four-to-one advantage of Philadelphia under parity rates if adjustment is made for the tonnage which, as found by the Commission, was consigned to Philadelphia but diverted to Baltimore because of a strike, and for that part of the tonnage destined for furnaces west of the seventeen points. To these western points the New York and Philadelphia carriers have voluntarily maintained noncompetitive rates, higher than the Baltimore rates by margins many times greater than any differential in issue. This is a temporary concession of traffic to the Baltimore carriers that shows nothing about the effect of either parity or a reasonable differential. Of 412,817 tons of Labrador ore moved through Baltimore to destinations west of Pittsburgh, 113,210 tons had been diverted by the strike and 114,318 tons were in cargoes forced to Baltimore by the noncompetitive rates. This leaves Baltimore 185,289 tons affected by parity rates against 631,730 tons at Philadelphia, which total would have been 744,940 tons but for the strike. (Figures are for the period August 1 — December 5, 1954.)

The District Court was, therefore, clearly right in holding that the Commission has not made findings to show how it reached its apparent conclusion that competitive considerations required it to disregard normal rate-making standards. Did the Commission decide that the immense receipts at Sparrows Point would justify an allocation to other ports of the iron ore that moves to Central Territory? This lurking suggestion is never clearly articulated, and we think that if it had been articulated the Commission would have recoiled from it. Did it decide that an allocation of all the Labrador ore to the more northern ports is necessary to give them sufficient volume to support the kind of facilities that national defense or some other public interest requires? There is no such finding, and it is not consistent with what is said about fair competition.

The lack of findings essential to the Commission's conclusion is sufficient ground for affirming the District Court. As Judge *Learned Hand* has stated in *B. & O. R. Co. v. U. S.*, 22 F. Supp. 533, 537 (N.D.N.Y., 1937):

> "Their conclusion may have been in fact justified, but we have no way of knowing it, and either we should have to abdicate our duty to enforce the law as we understand it, or we should have to substitute our own conclusions upon matters which only the Commission is fitted to consider. The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. * * * What findings are 'basic' is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside."

The lack of findings is too manifest to require further argument. We call the Court's attention to the Solicitor General's acknowledgment, page 5 of the Jurisdictional

Statement filed on behalf of the United States, that the necessity for further findings "may well be the case." We also call attention to the opinion of the United States District Court for the District of Massachusetts in an appeal from an order of the Commission, made in the same proceeding and on the same record as the orders involved here. *Boston and Maine Railroad, et al. v. U. S., et al.*, ... F. Supp. ..... (1957, Civil Action No. 56-928-A). The District Court, in an opinion by Judge *Magruder*, affirmed the Commission's disapproval of parity rates from Boston as not compensatory. Speaking of the issue that would be raised if it were not for this ground for disapproving Boston rates equal to the Baltimore level, Judge *Magruder* stated that the Commission would then have to take into account "the assured prospect that by far the greatest amount of import ore will in the future come from Labrador, a point of origin giving the port of Boston a geographical advantage of sea transportation." The Commission's report neither denies the importance and relevance of this prospect — it confirms that it is both important and relevant — nor shows how it dealt with it.

CONCLUSION

The District Court, in holding that the Commission's order was not based on adequate findings, was clearly right. It is respectfully submitted that this ground sustains the decision on appeal, and other issues listed by the various parties need not be considered.

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